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No. 96-___

In The

Supreme Court of the United States

October Term, 1996

LIBERTARIAN PARTY OF ILLINOIS, MIKE GINSBERG, R.W. BARUTH, JR., CARRIE BELT, JEANNETTE CLINKENBROOMER, GREG ENGSTROM, ROBERT H. FRANKE, ROBERT J. JOHNSTON, CHARLES MELALITZ, JOHN NELSON, DAN O'CONNELL, PAUL SALANDER, GALE TESCHENDORF, LYN TINSLEY, ANNE WAGNER, and MARTIN G. YASUS,

Petitioners,

vs.

WANDA L. REDNOUR, HANNELORE HUISMAN, KENNETH R. BOYLE, JUDITH A. JONES, MITCHELL B. KOBELINSKI, DAVID E. MURRAY, LANGDON D. NEAL, and THERESA M. PETRONE, in their official capacities as members of the ILLINOIS STATE BOARD OF ELECTIONS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the petitioners had First and Fourteenth Amendment constitutional rights to ballot access for their congressional candidates in view of the fact the Libertarian Party of Illinois (LPI) already had ballot access for its President, Vice President and U.S. Senate candidates and in view of *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), and related decisions?

2. Whether the state-imposed ballot access restrictions on so-called "new party" congressional candidates were (and continue to be), in reality unconstitutional state qualifications on federal offices?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners LIBERTARIAN PARTY OF ILLINOIS (LPI), et al. petition for a writ of certiorari to issue to review an opinion of the Seventh Circuit which upheld unconstitutional restrictions to ballot access contained in the Illinois Election Code.

The case below involved the LPI, its state chair Mike Ginsberg, seven candidates who wanted to seek LPI's nomination for Representative in Congress in the general primary election on March 19, 1996 and several voters who wanted to support and vote for the LPI and the candidate petitioners. The respondents are the individual members of the Illinois State Board of Elections (ISBE), the agency responsible for the overall administration and supervision of elections in the State of Illinois.

OPINIONS BELOW

The opinion of the Seventh Circuit was rendered on March 7, 1997, and is reported at 108 F.3d 768 (CA 7, 1996). See Appendix A. The memorandum opinion of the district court was issued on February 7, 1996. See Appendix B.

JURISDICTION

Supreme Court jurisdiction is invoked pursuant to 28 U.S.C. sections 1254 (1), 1651 and 2106, and Article III of the Constitution of the United States.

This petition was filed within ninety (90) days of the opinion appealed from in the Seventh Circuit. No petition for rehearing was filed in the appellate court.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONSTITUTION

Article One, Section 2, Clause 2:

> . . . No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Article One, Section 4, Clause 1:

> The Times, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by The Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

First Amendment:

> Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble . . .

Fourteenth Amendment, Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside . . . No State shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Illinois Election Code, 10 Illinois Compiled Statutes (ILCS) 5/1-5/30.

Article 7: The Making of Nominations By Political Parties

Section 5/7-10: Petitions For Nomination- . . . Names required.

> . . . Such petitions for nomination shall be signed:
>
> (b) If for a congressional officer . . . by at least .5% of the qualified primary electors of his party in his congressional district, except that for the first primary following a redistricting of congressional districts such petitions shall be signed by at least 600 qualified primary electors of the candidate's party in his congressional district.

Article 10: Making of Nominations in Certain Other Cases

> Section 5/10-2: "Political party" and "established political party" defined . . .
>
> The term "political party", as hereinafter used in this Article 10, shall mean any "established political party", as hereafter defined and shall also mean any political group which shall hereafter undertake to form an established political

party in the manner provided for in this Article 10 . . .

A political party which, at the last general election for State and county officers, polled for its candidate for Governor more than 5% of the entire vote cast for Governor, is hereby declared to be an "established political party" as to the State and as to any district or political subdivision thereof.

A political party which, at the last election in any congressional district, legislative district . . . or other political subdivision or district in the State, polled more than 5% of the entire vote cast within such territorial area or political subdivision, as the case may be . . . is hereby declared to be an "established political party" within the meaning of this Article as to such district or political subdivision . . .

. . . Any such petition for the formation of a new political party throughout the State . . . shall be signed by 1% of the number of voters who voted at the next preceding Statewide general election or 25,000 qualified voters, whichever is less . . .

If the new political party shall be formed for any district or political subdivision less than the entire State, such petition shall be signed by qualified voters equaling in number not less than 5% of the number of voters who voted at the next preceding regular election in such district or political subdivision in which such district or political subdivision voted as a unit for the election of officers to serve its respective territorial area . . .

For the first election following a redistricting of congressional districts, a petition to form a new

political party in a congressional district shall be signed by at least 5,000 qualified voters of the congressional district.

STATEMENT OF THE CASE

This case involves the subject of a third party's access to the ballot in the State of Illinois. It involves the constitutional rights to vote, to associate politically and to be free from state-imposed qualifications for congressional office which are impermissible under Article One of the U.S. Constitution. Petitioners filed a complaint in the district court in Chicago, seeking to redress the deprivation of these rights by respondents.

The basis for subject matter jurisdiction in the district court was provided by 28 U.S.C. sections 1331, 1343 (a)(3) and (4) and by 42 U.S.C section 1983. Petitioners' rights under Article One and under the First and Fourteenth Amendments were violated by respondents under color of state law, the Illinois Election Code, which this court has had occasion to review in the past. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Norman v. Reed*, 502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992).

The LPI sought to have declared unconstitutional certain provisions of the Election Code which prohibited third parties, including established third parties such as LPI at the time this lawsuit commenced, from nominating candidates for offices other than statewide offices in primary elections. LPI also sought to have declared unconstitutional the provisions which required LPI, as a third party established for statewide elections, to revert to

Article 10 petitioning requirements for new parties in order for local LPI candidates to gain access to the general election ballot even though LPI candidates for President and U.S. Senate already had ballot access by virtue of LPI's status as an established party for statewide elections.

The case was commenced by the filing and service of a complaint on November 7, 1995, seeking declaratory and injunctive relief from the provisions of Article 10, section 2 of the Election Code. An Amended Complaint was filed and served on or about January 2, 1996. Plaintiffs then moved for a Preliminary Injunction, as the March 19th Primary election was fast approaching.

By agreement of the parties, the motion for preliminary injunction was treated as a motion for a permanent injunction and for summary judgment. The defendants cross-moved for summary judgment. On February 8, 1996, the district court granted the defendants' cross-motion for summary judgment.

Notice of Appeal was filed on March 6, 1996. The appellate court's jurisdiction was invoked pursuant to 28 U.S.C. 1291, in that the plaintiffs were appealing from a final decision of the district court that disposed of all claims with respect to all parties. The issues presented in that appeal were whether the ballot access restrictions challenged by LPI were unconstitutional and whether the district court erred in upholding their constitutionality.

The Seventh Circuit affirmed the district court on March 7, 1997. The Seventh Circuit found the restrictions constitutional, and concluded the state restrictions were

valid "so that the citizens can choose their elected officials in an orderly electoral process." Appendix A, page 20.

Will County, Illinois Republican Chairman Hugh Stipan was more direct. He said:

> **People in power make the rules to favor themselves, and I don't think its a bad rule.**

As quoted in "The Herald News." He was referring to the practical effect of the restrictions upheld by the courts below, which now require the LPI and other third parties with less than complete established party status, to acquire nearly 1.3 million signatures to qualify candidates for all local elections, and these signatures must be collected in a 90 day time frame.

Is it any wonder two parties dominate the system?

REASONS FOR GRANTING THE WRIT

1. **The decision below violates petitioners' constitutional rights to cast their votes effectively and to associate for the advancement of political ideas through the creation and development of LPI and is in direct conflict with *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Norman v. Reed*, 502 U.S. 279 (1992).**

The court below misapplied the rulings of this court in *Anderson/Burdick* and gave no weight to the factors which required entry of a finding that the state's ballot access restrictions, as applied to LPI, violated the First

and Fourteenth Amendments. The historical record of failure to surmount those restrictions, the serious (which the court below mentioned as "slight") injuries to petitioners' First and Fourteenth Amendment rights, the irrationality of the restrictions as a means of protecting the state's legitimate interests and the fact that the state's interests simply did not make it necessary to burden the petitioners' rights with these particular restrictions, were all factors which compelled the conclusion that the challenged restrictions were unconstitutional under *Anderson/Burdick*.

The restrictions were not narrowly drawn to advance a state interest of compelling importance. *Burdick v. Takushi, supra,* 112 S.Ct. at 2064, citing *Norman v. Reed,* 112 S.Ct. at 705. The fact that LPI was already on the ballot with its President and U.S. Senate candidates, rendered nonsensical the claim of the state that allowing LPI congressional candidates on the ballot would result in voter confusion and/or ballot clutter. This court cannot and should not allow mere recitation of that mantra to automatically prevail over LPI's constitutional challenge.

The court below cites the fact LPI gained statewide ballot access as a result of polling over 5% in November, 1994, in the state wide election for University of Illinois Trustees. Appendix A, at 8. Hugh Stipan's colleagues in the Democratic and Republican Parties closed that loophole to ballot access by third parties. As of January 1, 1996, University of Illinois Trustees are appointed, not elected. A.4, note 2 and see *Tully v. Edgar,* 171 Ill.2d 297, 664 N.E.2d 43 (1996).

The court below incredibly cites the fact that in the November 6, 1996, general election, LPI had ten out of the fourteen third party congressional candidates on the ballot. A.15 at note 11. This fact is cited for the proposition that the burdens imposed by the respondents were not insurmountable. A.15

What this fact truly demonstrates is that the state has no legitimate interest in the signature requirements. None of the ten LPI congressional candidates submitted more than one page of signatures, some with as few as two signatures. The signature requirement is irrelevant if no one objects to the petitions. The Election Code mandates acceptance of nominating petitions as presumptively valid unless challenged by a qualified objector. See 10 ILCS 5/10-8.

Each of those ten LPI congressional candidates were on the ballot because neither the Democrats nor the Republicans bothered to file objections. Another ten LPI congressional candidates and fifty-two state and county LPI candidates were stricken from the November, 1996 ballot by respondents and their local counterparts. In at least twelve of those elections, the objector was the opposing candidate and the effect of granting their objections was to leave the election uncontested.

Out of seventy-six LPI candidates in November, 1996, fourteen were on the ballot; sixty-two were stricken from the ballot. The fourteen who were on the ballot included three who had automatic ballot access (President, Vice-President and U.S. Senate), ten congressional candidates and one state senate candidate who were on simply because no one objected to them.

When reviewing challenges to a state's election laws, courts must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments against the precise interests put forward by the state as justification for the burdens resulting from its rule. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

When, as here, the state subjects these rights to severe restrictions, the regulations must be narrowly drawn to advance a state interest of compelling importance. *Norman v. Reed*, 502 U.S. 279, 289 (1992); *Socialist Workers Party*, 440 U.S. at 284.

The respondents have not narrowly drawn their regulations. They have set up a byzantine maze of rules designed to trap the unwary. The objection process allows the Democrats and Republicans to pick and choose which candidates and which elections they will challenge. Without such a challenge, the nominating petitions are accepted whether or not the signature requirement is met. Even if the signature requirements are met, an objector can challenge the signatures, opening up an entirely new area of litigation that third parties can ill afford.

The importance of the petitioners' constitutional rights to cast their votes effectively and to associate for the advancement of political ideas through the creation and development of the LPI cannot be denied. Yet this was precisely the effect of the decisions below.

Contrary to the statement in the appellate opinion that LPI did not dispute the importance of the interests put forth by the respondents, LPI alleged, argued and

showed that the mantra of interests advanced by respondents: preventing ballot clutter, avoiding voter confusion (one cannot help but wonder how a person ever manages to choose between the variety of products at the grocery store) and requiring demonstration of a modicum of public support, were nothing more than a mantra used to maintain the ballot monopoly of the Democrats and Republicans. See Appendix C, Declaration of Mike Ginsberg and Appendix D, Declaration of Richard Winger.

While the administration of the election process is largely entrusted to the states, a state cannot infringe on basic constitutional protections. *Kusper v. Pontikes*, 414 U.S. 51, 57 (1974); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). It is once again time for the Supreme Court to review and correct the constitutional defects in the Illinois Election Code. Briefs on the merits will flesh out these defects and demonstrate that LPI's injunction and its request for declaratory relief should have been, and must now be granted by this court.

2. The restrictions imposed by the state on so-called "new party" congressional candidates are, in reality, unconstitutional state-qualifications on federal offices.

LPI alleged the suspect ballot access restrictions were, in effect, impermissible qualifications for membership in the House of Representatives and therefore in violation of Article 1, section 2, clause 2 of the Constitution. In ruling this was not the case, the court below is in direct conflict with this court.

The Supreme Court has held that neither Congress nor any state may impose additional qualifications or alter existing ones. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. ___, 115 S.Ct. 1842, 1854, 131 L.Ed.2d 881 (1995). The Elections Clause does not give states the authority to impose substantive qualifications that handicap classes of candidates, even if those regulations are characterized by the state as procedural in nature.

The regulations here, while couched in procedural terms, are designed to deny a class of candidates: third party, "new party" and independent candidates, from satisfying the procedural hurdles. The regulations are not evenhanded or generally applicable to all candidates. They undermine the integrity and the reliability of the electoral process. They insure continued monopoly control by the Democrats and Republicans. They foster voter apathy by unduly restricting the choices potential voters will have if they exercise their right to vote.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit Court of Appeals, which upheld the unconstitutional ballot access restrictions imposed on the Libertarian Party of Illinois and its congressional candidates by the Illinois Election Code as administered by the respondents.

Respectfully submitted,

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June 5, 1997

APPENDIX A

LIBERTARIAN PARTY OF ILLINOIS, Mike Ginsberg, R.W. Baruth, Jr., Carrie Belt, Jeannette Clinkenbroomer, Greg Engstrom, Robert H. Franke, Robert J. Johnston, Charles Melalitz, John Nelson, Dan O'Connell, Paul Salander, Gale Teschendorf, Lyn Tinsley, Anne Wagner, and Martin G. Yasus, Plaintiffs-Appellants,

v.

Wanda L. REDNOUR, Hannelore Huisman, Kenneth R. Boyle, Judith A. Jones, Mitchell B. Kobelinski, David E. Murray, Langdon D. Neal, and Theresa M. Petrone, in their Official Capacities as Members of the Illinois State Board of Elections, Defendants-Appellees.

No. 96-1561.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 6, 1996.

Decided March 7, 1997.

Political party, individual members, and voters brought § 1983 action against members of state elections board to challenge requirements for access to election ballots. The United States District Court for the Northern District of Illinois, Charles P. Kocoras, J., granted summary judgment for board members. Plaintiffs appealed. The Court of Appeals, Kanne, Circuit Judge, held that: (1) requirement that new political party meet a 5% petitioning requirement in order to place congressional candidate

on general election ballot was rationally related to furthering important state interest and thus did not unconstitutionally burden right to vote or to associate for political purposes; (2) requirement that political party must have received more than 5% of vote in gubernatorial election in order to achieve established party status for all state, local, and congressional races was rational and did not unconstitutionally restrict right to vote and right to associate for political purposes; and (3) election code provisions in question did not state substantive qualifications of congressional candidates so as to violate qualifications clause of United States Constitution.

Affirmed.

Gary Sinawski (argued), New York City, Andrew B. Spiegel, Wheaton, IL, for plaintiffs-appellants.

Mary E. Welsh (argued), Officer of the Attorney General, Civil Appeals Division, Chicago, IL, for defendants-appellees.

Before CUMMINGS, RIPPLE, and KANNE, Circuit Judges.

KANNE, Circuit Judge.

This case resolves whether certain provisions of the Illinois Election Code unconstitutionally impair the ability of a new political party to place its congressional candidates on the general election ballot. The plaintiffs-appellants consist of one entity and two groups of individuals: the Libertarian Party of Illinois (including its chairperson), seven candidates who sought the party's

nomination for United States Representative in the Illinois March 1996 general primary election, and several voters who wanted to vote for these candidate-plaintiffs.[1] The LPI sued defendants-appellees-members of the Illinois State Board of Elections ("the Board") – in their official capacities, seeking declaratory and injunctive relief that would require the Board to include the Libertarian Party's congressional candidates on all primary election ballots across the state. The Board, however, successfully moved for summary judgment, thereby keeping the Libertarian candidates out of the primaries. Because we find that the Illinois ballot access requirements do not unconstitutionally impair the rights of the LPI, we affirm the decision of the district court.

I. History

The Illinois Election Code sets forth instructions detailing when candidates from a political party may be placed on the ballot in state, local, and congressional elections. See 10 Ill.Comp.Stat. 5/1-5/30. In essence, the Code characterizes political parties in two categories: "established" and "new." If a party receives more than 5% of the vote in the last general election for governor, that party is considered an established political party for all state, local, and congressional races. 10 Ill.Comp.Stat. 5/10-2. If a party receives more than 5% of the vote in certain other statewide elections, *e.g.*, United States Senate, Illinois Attorney General, or the University of Illinois

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[1] This opinion will collectively refer to plaintiffs-appellants as the "LPI" unless the individual categories of plaintiffs are otherwise relevant.

Board of Trustees,[2] that party is considered established only for statewide elections, and not for congressional or other non-statewide elections. *Id.* Finally, a party that receives more than 5% of the vote in the last election within any congressional district or other political subdivision, *e.g.*, United States House of Representatives, is considered an established political party only for that district. *Id.* A party remains established only as long as it maintains the above criteria. *Id.* Parties that are not established are considered new parties.

The distinction between established and new political parties is significant because it affects the nomination process by which candidates are ultimately placed on the general election ballot. In general, an established party nominates its candidates for the general election through a primary election. To appear on a primary election ballot, a candidate seeking an established party's nomination must submit a petition with signatures from 0.5% of the qualified primary electors. 10 Ill.Comp.Stat. 5/7-10. For the March 1996 primary election, Democratic congressional candidates needed to submit an average of 658 signatures, and Republican candidates needed to submit an average of 532 signatures.[3]

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[2] As of January 1, 1996, the University of Illinois Trustees are appointed, not elected. *See generally Tully v. Edgar*, 171 Ill.2d 297, 215 Ill.Dec. 646, 664 N.E.2d 43 (1996).

[3] Although not at issue here, the Illinois Election Code requires established party candidates to obtain 600 signatures following decennial congressional redistricting. 10 Ill.Comp.Stat. 5/7-10.

If a political party is not established in a particular political subdivision, and thus considered new, its candidates can gain access only to the general election ballot. A group forms a new political party by submitting a complete slate of candidates for all of the offices to be filled in that political subdivision, as well as a petition containing a specified number of signatures. 10 Ill.Comp.Stat. 5/10-2. If the new party is being formed for the entire state, the petition must contain signatures totaling the lesser of 25,000 or 1% of the voters in the last statewide general election. *Id.* If the new party is being formed only for a congressional district or other political subdivision, the petition must contain the lesser of 5% of the total number of voters in the district's last regular election or the number of signatures needed for statewide formation.[4] *Id.* In becoming a "new political party," a party gains the ability to place candidates on the next general election ballot for the offices to be voted on within the state or the particular political subdivision.[5] *Id.* Individual independent candidates must satisfy nearly identical nominating requirements to appear on the general election ballot. See 10 Ill.Comp.Stat. 5/10-3. In 1996, the average number of signatures needed by a new political party to place its congressional candidates on the general election ballot was 7,610, and the average number in the congressional districts of the seven candidate-plaintiffs was 9,337.

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[4] Following congressional redistricting, 5,000 signatures are required. 10 Ill.Comp.Stat. 5/10-2.

[5] A new political party also has the ability to fill vacancies in nomination pursuant to 10 Ill.Comp.Stat. 5/10-11. See 10 Ill.Comp.Stat. 5/10-2.

Heading into the 1996 primary and general elections, the Libertarian Party of Illinois was an established party for all statewide elections, and a new party for all congressional elections. The LPI was able to gain established party status for all statewide elections because three Libertarian candidates combined to capture 5.5% of the vote in the 1994 election of the University of Illinois Board of Trustees. The LPI, however, could not obtain established party status for all elections within the state – *i.e.*, state, local, and congressional – because it received only 1.68% of the vote in the last governor's race, well below the 5% threshold. Moreover, because no Libertarian candidate captured more than 5% of the vote in any of the 1994 congressional races, the LPI was not established in those districts in 1996.

On December 18, 1995, ten LPI candidates[6] for the United States House of Representatives attempted to file nominating petitions for seven congressional districts in the March 1996 general primary election. The Board, however, refused to accept these petitions because the LPI was not an established party in any of those congressional districts. In fact, the petitions, which consisted only of a Statement of Candidacy and a single page of signatures, did not appear to contain an adequate number of signatures even for an established party's candidate.

The LPI subsequently brought suit against the Board under 42 U.S.C. § 1983, alleging that these ballot access

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[6] Seven of these candidates are the following candidate-plaintiffs: Clinkenbroomer, Engstrom, Franke, Salander, Teschendorf, Tinsley, and Yasus.

requirements violated their rights under the First Amendment, the Fourteenth Amendment, and the Qualifications Clause of the United States Constitution. The LPI asked the district court to enjoin the Board, and require it to include its candidates on all congressional primary ballots across Illinois. The district court denied this request, and granted the Board's motion for summary judgment.

II. Analysis

A. *Standard of Review*

We utilize a *de novo* standard of review in analyzing a district court's grant of summary judgment. *Campbell v. Towse*, 99 F.3d 820, 826 (7th Cir.1996). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the party opposing the motion and draw all justifiable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986). However, neither "the mere existence of some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, 106 S.Ct. at 2510, nor the demonstration of "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), will

sufficiently demonstrate a genuine issue of material fact. In that regard, the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512.[7]

B. First and Fourteenth Amendments

The LPI complains that the nominating procedures applicable to "minor-established"[8] political parties – *i.e.*, parties that are "established" for statewide elections and "new" for individual congressional elections – are unconstitutional because they unduly impair the access of candidates to the general election ballot for congressional (and other non-statewide) elections. Specifically, the LPI argues that Illinois violates the rights of its citizens to vote effectively and to associate for the advancement of

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[7] We note that even though the November 1996 election is over, this controversy is not moot because it falls under the category of election cases that are "capable of repetition, yet evading review." *See Norman v. Reed*, 502 U.S. 279, 288, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992).

[8] The LPI, not the Illinois Election Code, provides the characterization of political parties as either "major" or "minor" established parties. The Code classifies political parties as either "established" or "new" within a particular political subdivision. Presently, the Democratic and Republican parties are established for statewide and non-statewide elections as a result of their performances in the last gubernatorial election. The LPI did not become established in this way; it obtained its established status only for statewide elections by virtue of the combined performance of three of its candidates in the election for the University of Illinois Board of Trustees. Thus, although the LPI refers to itself as a "minor-established" party, it cannot change the fact that it is a "new" party for every congressional district within the state.

political ideas. The Party asserts that the Illinois Election Code accomplishes this goal through two "intimately-related" ballot access regulations: one that requires "new" political parties to meet a 5% petitioning requirement in order to gain access to the general election ballot, and the other that prohibits so-called "minor-established" parties from nominating congressional candidates via primary elections.

The right to vote and the right to associate for political purposes remain two of the more fundamental rights present under our Constitution. These rights, however, are not absolute. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S.Ct. 533, 536, 93 L.Ed.2d 499 (1986). In addressing state ballot access laws, the Court has noted that such requirements

> place burdens on two different, although overlapping, kinds of rights – the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.

Williams v. Rhodes, 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968); *see also Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979).

When reviewing challenges to a state's election laws, courts must weigh the " 'character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . . ' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.' " *Burdick v. Takushi*, 504 U.S.

428, 434, 112 S.Ct. 2059, 2063, 119 L.Ed.2d 245 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983)). In applying this flexible standard, courts must also consider "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* (quoting *Anderson*, 460 U.S. at 789, 103 S.Ct. at 1570). If the state subjects these rights to "severe" restrictions, the regulations must be "narrowly drawn to advance a state interest of compelling importance," *Norman v. Reed*, 502 U.S. 279, 289, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992); *see Socialist Workers Party*, 440 U.S. at 184, 99 S.Ct. at 990. If the state imposes reasonable, nondiscriminatory restrictions on these rights, however, the state's important regulatory interests will generally be sufficient to justify the regulations. *Burdick*, 504 U.S. at 434, 112 S.Ct. at 2063-64.

In this case, the LPI asserts that the Illinois ballot access laws violate their constitutional rights to cast their votes effectively and to associate for the advancement of political ideas through the creation and development of a new political party.[9] The importance of these rights, which are derived from the First and Fourteenth Amendments, *see Norman*, 502 U.S. at 288, 112 S.Ct. at 704-05, cannot be denied. The Supreme Court has maintained

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[9] The LPI does not appear specifically to allege a separate equal protection violation. In *Anderson*, the Supreme Court based its analysis on a general application of the First and Fourteenth Amendments when reviewing the constitutionality of ballot access regulations. *See Anderson*, 460 U.S. at 786 n. 7, 103 S.Ct. at 1569 n. 7. That decision, however, also relied upon the analysis of several election cases involving the Equal Protection Clause of the Fourteenth Amendment. *Id.*

that the "right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.' " *Anderson*, 460 U.S. at 787, 103 S.Ct. at 1569; *accord Lubin v. Panish*, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974); *Williams*, 393 U.S. at 31, 89 S.Ct. at 10. The exclusion of candidates also impairs freedom of association, especially when considering the "effective platform" that election campaigns provide for rallying "like-minded citizens" behind various viewpoints on the salient issues of the day. *Anderson*, 460 U.S. at 787-88, 103 S.Ct. at 1569-70.

In response to LPI's asserted injury, the Board puts forth the following countervailing interests to justify the ballot access requirements: preventing ballot clutter, avoiding voter confusion, and requiring parties to demonstrate a significant modicum of public support before it has access to the ballot. The LPI, for good reason, does not dispute the importance of these interests.

The Supreme Court has long permitted states to impose various restrictions limiting a candidate's access to the ballot. States have not only an interest, but also a duty to ensure that the electoral process produces order rather than chaos. *See Storer v. Brown*, 415 U.S. 724, 729, 94 S.Ct. 1274, 1278-79, 39 L.Ed.2d 714 (1974); *see also* U.S. Const. art I, § 4, cl. 1 (providing that states may prescribe the time, place, and manner for holding congressional elections). Significantly, the Court has held that states have a vital and compelling interest in requiring "political parties appearing on the general ballot [to] demonstrate a significant, measurable quantum of community support." *American Party of Texas v. White*, 415 U.S. 767,

782 & n. 14, 94 S.Ct. 1296, 1307 & n. 14, 39 L.Ed.2d 744 (1974). This preliminary demonstration of a "significant modicum of support" furthers the state's legitimate interest of "avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971).

In that regard, the Court has "never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro*, 479 U.S. at 194-95, 107 S.Ct. at 537. To demand otherwise would require a state's political system to sustain some damage before it could correct the problem, deprive state legislatures of the ability to show foresight in avoiding potential deficiencies, and inevitably lead to endless litigation regarding the sufficient amount of voter confusion and ballot overcrowding needed to warrant ballot access restrictions. *Id.* at 195-96, 107 S.Ct. at 537-38.

In two cases presenting facts strikingly similar to those before us, the Court ultimately determined that the states' important regulatory interests sufficiently justified their ballot access requirements. In *Jenness*,the Court held that Georgia did not abridge the speech and association rights of prospective candidates and registered voters via its two-pronged political association classification system. Georgia classified a "political party" as any political organization whose candidate had received at least 20% of the vote in the last gubernatorial or presidential election. *Jenness*, 403 U.S. at 433, 91 S.Ct. at 1971-72. The

candidate of a "political party" could appear on the general election ballot only by winning a state-regulated primary election. *Id.* A "political body," on the other hand, was any political organization that did not meet the 20% threshold. *Id.* Candidates from a "political body" (or any other independent candidate) gained access to the general election ballot only by filing a nominating petition signed by at least 5% of the total number of voters eligible to vote in the last election for the relevant office. *Id.* The *Jenness* Court held that this system, with its 5% petitioning requirement, neither "freezes the status quo" of American political life, nor in any way "abridges the rights of free speech and association secured by the First and Fourteenth Amendments." *Id.* at 439, 440, 91 S.Ct. at 1975.

Later in *Norman*, the Court embraced its *Jenness* decision by upholding an Illinois election provision that required a candidate to obtain 5% of the vote or 25,000 petition signatures before it could run under an otherwise established political party's name within a particular voting district where that party was not yet established. Specifically, the Court sustained a law that ultimately required the Harold Washington Party to satisfy the 25,000 signature petition requirement for candidates vying for the suburban-district Cook County commissioner seats, even though it separately satisfied this requirement in the municipal district of the county and for countywide elections.[10] *Norman*, 502 U.S. at 295, 112

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[10] We note, however, that the Court also determined that the State could not disqualify the Harold Washington Party's entire slate of candidates in Cook County, including its

S.Ct. at 708-09. In that regard, the Court noted that "[j]ust as the State may not cite the Party's failure in the suburbs as reason for disqualifying its candidates in urban Cook County, neither may the Party cite its success in the city district as a sufficient condition for running candidates in the suburbs." *Id.*

As in *Jenness* and *Norman*, we find that the State's interests in this case are "sufficiently weighty to justify the limitation" upon LPI's rights. *See Norman*, 502 U.S. at 288-89, 112 S.Ct. at 705. Initially, we reject LPI's thin assertion that the ballot access restrictions are unduly severe. "[B]allot-access measures that result in any sort of disparate treatment" do not "automatically require[ ] strict scrutiny" analysis. *Rockefeller v. Powers*, 74 F.3d 1367, 1377 (2d Cir.1995), *certs. denied*, ___ U.S. ___, ___, 116 S.Ct. 1703, 1704, 134 L.Ed.2d 802 (1996); see also *id.* at 1377-78 n. 16 (explaining cases that discuss this proposition). In light of *Jenness*, *Norman*, and several other cases, the LPI cannot argue that the 5% petitioning requirement is severe on its face. *See e.g.*, *American Party of Texas*, 415 U.S. at 789, 94 S.Ct. at 1310 (requiring signatures that equal 3% or 5% of the vote is not facially invalid). The various freedoms available to new political parties in nominating its candidates and operating its affairs further demonstrates the rather minor burden imposed by the challenged regulations. For example, a new party may select its own slate of candidates via a party convention or otherwise; and unlike established parties, a new party is

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municipal and county-wide candidates, based on the fact that it failed to collect enough petition signatures in the suburban district. *See Norman*, 502 U.S. at 291-94, 112 S.Ct. at 706-08.

not required to participate in a primary election – a condition that the plaintiffs in *Munro* claimed was "qualitatively more restrictive than requiring signatures on a nominating petition." *Munro*, 479 U.S. at 197, 107 S.Ct. at 538. The *Munro* court ultimately rejected this argument, finding that the "differences between the two mechanisms [were not] of constitutional dimension." *Id.* Finally, the fact that two third-party candidates for United States Representative gained access to the 1994 Illinois general election ballot illustrates that the requirements do not pose an insurmountable obstacle to the LPI's access.[11] Because the restrictions here are not severe, we need not determine whether they are narrowly tailored to satisfy the State's compelling interests.

Rather, we need only determine whether Illinois has important interests that sufficiently justify the burden on LPI's rights. The crux of the LPI's claim is that the ballot access requirements irrationally and unnecessarily construct a "disparity between the nomination processes applicable to major and minor party candidates for non-statewide offices." This disparity, however, serves the

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[11] In addition, six such candidates were on the ballot in 1992 (when access to the ballot required only 5,000 signatures due to the decennial redistricting exception), two in 1990, and one in each of the years 1988, 1986, and 1984.

Moreover, in the November 5, 1996 general election (the day before oral argument), fourteen third-party candidates (including ten Libertarians) had access to the ballot. The LPI, however, argues that this number is irrelevant because these candidates did not submit nominating petitions containing the full amount of signatures; rather, they submitted a single page of signatures, recognizing that petitions are accepted by the state as presumptively valid unless challenged.

State's important interest of ensuring that a political party that is new in a particular political subdivision demonstrates a modicum of public support before it can place its candidates on an election ballot. As in *Jenness*, the Illinois regulations merely permit the State to require new political parties to demonstrate a significant modicum of support via a 5% petitioning requirement in lieu of a primary election. Moreover, as in *Norman* – which LPI glaringly fails to distinguish-Illinois's 5% petition signature requirement for each congressional district advances the State's *"separate"* and *"additional"* interest of ensuring that the LPI demonstrate a significant modicum of support "in the *particular electoral subdivision* for which the candidate is nominated," *Libertarian Party of Maine v. Diamond*, 992 F.2d 365, 372 (1st Cir.1993) (citing *Norman*, 502 U.S. at 295, 112 S.Ct. at 708-09). Because the Illinois ballot access requirements are nearly identical to those in *Jenness* and *Norman*, and because they similarly further the State's important interests in a rational manner, we find that they do not unconstitutionally burden the LPI's First and Fourteenth Amendment rights.

In comparing the petitioning requirements for an "established" party's candidate in a primary election and a "new" party's candidate in a general election, the LPI attempts to compare apples with oranges. It is true that the candidates for Congress from an established party need only meet a .5% petitioning requirement (to appear on the primary ballot), and the candidates from a new party need to satisfy a 5% petitioning requirement (to appear on the general ballot). An uncritical glance at these numbers would lead one to believe that an established party needs to satisfy a much easier requirement in

order to appear on the ballot. Unlike an established party, however, a new party has not yet demonstrated a significant modicum of support. The established party has already jumped the hurdle of demonstrating its public support by receiving 5% of the vote in the last congressional (or gubernatorial) election. Thus, it is neither irrational nor unfair to require a candidate from a new party to obtain a greater percentage of petition signatures to appear on the general election ballot than a candidate from an established party for the primary election ballot. The two petitioning requirements contain different percentages because they are used at two different times for two different purposes.[12]

Nor is it irrational for the State to grant established party status for both statewide and non-statewide elections based on the results from a gubernatorial election rather than another election, such as the election for the University of Illinois Board of Trustees. The Illinois governor's race traditionally draws the highest number of voters; thus, the ability of a single candidate to obtain 5% of these votes demonstrates significant support throughout the state. The Libertarian candidates' ability to obtain 5.5% of the vote (by combining the votes from three candidates) in the Board of Trustees race simply does not

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[12] The purpose of the two petitioning requirements differ from each other in at least one other way. The .5% requirement that an established party's candidate must meet in order to gain access to the primary ballot provides *only that candidate* with access to the ballot. In contrast, when a new party meets the 5% petitioning requirement it gains access for *all of its candidates* within that particular political subdivision. See 10 Ill.Comp.Stat. 5/10-2.

suggest a similar modicum of support. This point is further evidenced by the fact that the Libertarian candidate received only 1.68% of the vote in the last gubernatorial election – barely a whisper of statewide endorsement. In that regard, we note the subtle irony in the LPI's complaint: if anything, the party benefited greatly from Illinois's liberal policy of allowing a party to combine the votes from three candidates in the rather unexciting Board of Trustees election in order to obtain established party status for future statewide elections, including those for governor, attorney general, and the United States Senate.

C. *Qualifications Clause*

The candidate-plaintiffs in this case also contend that the Illinois ballot requirements violate the Qualifications Clause of the United States Constitution because they are "substantive qualifications masquerading as mere ballot access restrictions." The candidate-plaintiffs claim that because the Illinois Election Code prohibits them from being nominated in a primary election and requires them to meet an extraordinarily high petitioning requirement, it excludes minor-party candidates, as a class, from seeking federal public office. We find this position untenable.

The Qualifications Clause provides the age, citizenship, and residency requirements necessary for a person to become a congressional representative. U.S. Const. art I, § 2. The Supreme Court has held that neither Congress nor any state may impose additional qualifications or alter the existing ones. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, ___, ___, 115 S.Ct. 1842, 1854, 1871, 131

L.Ed.2d 881 (1995) (holding that the State of Arkansas could not prohibit otherwise-eligible candidates from appearing on the general election ballot merely because they had already served a specified number of terms in office); *Powell v. McCormack*, 395 U.S. 486, 550, 89 S.Ct. 1944, 1979, 23 L.Ed.2d 491 (1969) (holding that the House of Representatives could not exclude any duly elected member that otherwise satisfies the constitutional requirements).

In *Term Limits*, however, the Court reasoned that where requirements are procedural in nature and do not add substantive qualifications, they do not violate the Qualifications Clause. *Term Limits*, 514 U.S. at ___, 115 S.Ct. at 1870. In that regard, states are entitled, under the Elections Clause,[13] to adopt "generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Id.* (quoting *Anderson*, 460 U.S. at 788 n. 9, 103 S.Ct. at 1570 n. 9).

Unlike the substantive qualifications in *Term Limits*, the ballot access requirements imposed by the Illinois Election Code are entirely procedural. *See id.* (distinguishing the provisions in *Storer* and other Election Clause cases, which were found constitutional, "because they regulated election procedures and did not even arguably impose any substantive qualification rendering a class of

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[13] This clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." U.S. Const. art. I, § 4, cl. 1.

potential candidates ineligible for ballot position"); *see also Storer*, 415 U.S. at 730-33, 94 S.Ct. at 1279-81 (rejecting challenge to California's petition signature requirement). As explained above, these procedural requirements merely assure that candidates meet a minimum threshold of voter support in order to maintain the integrity and regularity of the electoral process. They do not pose a substantive handicap that systematically excludes the Libertarian candidates from office.

The LPI cites *Term Limits* for the proposition that the Illinois restrictions are contrary to the "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.' " *Term Limits*, ___ U.S. at ___, 115 S.Ct. at 1850 (quoting *Powell*, 395 U.S. at 547, 89 S.Ct. at 1977, in turn quoting 2 Elliot's Debates 257 (A. Hamilton, New York)). In doing so, however, the LPI puts the wrong spin on the right idea. The citizens of Illinois should, and indeed do choose their public officials; the Illinois ballot access requirements merely require candidates, such as the Libertarian congressional candidates here, preliminarily to demonstrate a minimum level of public support so that the citizens can choose their public officials in an orderly electoral process.

The decision of the district court is hereby AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LIBERTARIAN PARTY OF ILLINOIS, MIKE GINSBERG, R. W. BARUTH, JR., CARRIE BELT, JEANNETTE CLINKENBROOMER, GREG ENGSTROM, ROBERT H. FRANKE, ROBERT J. JOHNSTON, CHARLES METALITZ, JOHN NELSON, DAN O'CONNELL, PAUL SALANDER, GALE TESCHENDORF, LYN TINSLEY, ANNE WAGNER, MARTIN G. YASUS,	)	95 C 6456
Plaintiffs,	)	
v.	)	
WANDA L. REDNOUR, HANNELORE HUISMAN, KENNETH R. BOYLE, JUDITH A. JONES, MITCHELL B. KOBELINSKI, DAVID E. MURRAY, LANGDON D. NEAL and THERESA M. PETRONE, in their official capacity as members of the Illinois State Board of Elections,	)	
Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on the parties' cross motions for summary judgment pursuant to Federal Rule

of Civil Procedure 56 and Plaintiffs' motion for a permanent injunction. For the reasons set forth below, Plaintiffs' motions are denied, while Defendant's motion for summary judgment is granted.

BACKGROUND

This case involves the constitutionality of certain requirements of Section 10-2 of the Illinois Election Code ("IEC"). The Plaintiffs, the Libertarian Party of Illinois and some of its candidates for the United States House of Representatives, allege that the petition and signature requirements for access to the March, 1996 Illinois primary are violative of the United States Constitution.

The relevant portions of the Illinois Election Code ("IEC") mandate when a political party is eligible to run in state, local, and congressional level primaries. In determining whether a party is considered "an established political party", and therefore eligible to run in primary elections, the IEC looks to the modicum of support that the particular party received in certain previous elections. For instance, if a political party received more than 5% of the votes in the last gubernatorial election, it is considered "an established political party" as to state level offices, as well as all local and Congressional offices. On the other hand, if a party receives 5% of the vote in another statewide election, such as the University of Illinois Board of Trustees, the party is considered "established" only at the state level and not at all of the individual district or local levels. Finally, a political party which polls more than 5% in a relevant district for an

election is considered an "established party" only for that particular district.

On December 18, 1995, Libertarian Party candidates for the U.S. House of Representatives attempted to file petitions for the General Primary Election in Illinois. These petitions were not accepted by the Illinois Election Board (the "Board"), however, because the Libertarian Party is not an established political party in regard to congressional races this year. In the last race for Governor, the Libertarian candidate received only 1.68% of the entire vote. As such, they were not automatically considered established in regard to statewide and all district elections. Moreover, the Libertarians failed to acquire more than 5% of the votes in any of the last Congressional races. However, in the 1994 general election, the three Libertarian candidates for the University of Illinois Board of Trustees combined to receive 5.5% of the vote, thereby making them eligible to be considered an established party only for statewide elections. Thus, the Libertarians are currently considered an established party only as to statewide elections, such as U.S. Senator.

The Libertarians brought this suit alleging that the requirements under the IEC are unconstitutional and seeking to enjoin the Board to include their candidates on all congressional primary ballots across the state.

LEGAL STANDARD

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits and other material show "that there is no genuine issue as to any material fact and the moving party is entitled to

judgment as a matter of law." Fed. R.Civ. P. 56(b). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party seeking summary judgment carries the initial burden of showing that no such issue of material fact exists. Pursuant to Rule 56(b), when a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue as to any material fact and that the moving party is not entitled to judgment as a matter of law. *Anderson*, 477 U.S. at 250.

The plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. "In such a situation there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323.

It is in consideration of these principles that we examine the parties' motions.

DISCUSSION

In *Burdick v. Takushi*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), the United States Supreme Court explained that while voting is one of the more fundamental rights under our constitution, it is not absolute. Because of practicality, as well as constitutional limits, the government has an important interest and duty to ensure

that the electoral process produces order rather than chaos. *Burdick*, 112 S.Ct. at 2063. Therefore, electoral laws that place some limits, burdens, and restriction on voters need to be carefully considered. However, the state cannot be required to advance a compelling state interest for every electoral law restriction. *Id.*

A court which is considering a challenge to a state election law must weigh the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against the "precise interests put forward by the State as justifications for the burden imposed by the rule" while considering "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570 (1983); *Burdick*, 112 S.Ct. at 2063. As such, the inquiry into the propriety of a state election law depends upon the extent that a challenged restriction burdens First and Fourteenth Amendment rights. *Burdick*, 112 S.Ct. at 2063. In *Norman v. Reed*, 502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992), the Supreme Court explained that when these rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman*, 112 S.Ct. at 705. However, when a state imposes reasonable, nondiscriminatory restrictions on the First and Fourteenth Amendments, the "State's important regulatory interests are generally sufficient to justify" these regulations. *Burdick*, 112 S.Ct. at 2063, quoting *Anderson*, 460 U.S. at 788, 103 S.Ct. at 1569-1570 n.9.

It has long been established that a state may impose reasonable restrictions to limit access to the ballot and control the number of parties and candidates which

appear on the ballot. Appropriate reasons for such restrictions include guarding against splintered parties, ensuring political stability, preventing unrestrained factionalism, avoiding voter confusion, preventing frivolous or fraudulent candidates, and assuring that the victor is the choice of at least a strong plurality of voters. *Storer v. Brown*, 415 U.S. 724, 729, 94 S.Ct. 1274, 1278-1279, 39 L.Ed.2d 714 (1974). "It is not the duty of the Court to find whether there is an easier way for a party to gain access to the ballot, but only to decide whether the restrictions placed upon a party are unduly burdensome." *McLaughlin v. North Carolina Board of Elections*, 850 F.Supp. 373, 384 (M.D.N.C. 1994).

In the instant case, the Board argues that the state has an interest in keeping the ballot easy to understand and uncluttered by candidates and parties who are not established and who do not possess a modicum of support. Plaintiffs, however, argue that the Illinois requirements are unconstitutional because they are unduly burdensome. The Supreme Court has held that requiring that a candidate or party show a modicum of support before being placed on a ballot is a legitimate interest for a state. *Jenness v. Fortson*, 403 U.S. 431, 91 S.Ct. 1970, 1976, 29 L.Ed.2d 554 (1971). In *Jenness*, the Supreme Court held constitutional a requirement that a party receive 20% of the vote in the last race for governor or president in order to be considered a political party. *Jenness*, 403 U.S. at 439-440. Thus, we believe that the 5% requirement of a modicum of support is well within constitutional requirements. *See also Norman v. Reed*, 112 S.Ct. 698 (1992) (in which the Supreme Court found the Illinois requirement of 5% or 25,000 signatures, whichever was less, to be an

established political party was within constitutional boundaries).

Nevertheless, the Libertarians argue that the distinction between the effect of achieving 5% in gubernatorial elections and other state offices is unfair. We do not agree. In *Norman v. Reed*, 112 S.Ct. 698 (1992), the Supreme Court explored the issue of one party's legitimacy in one district versus another. In *Norman*, the Harold Washington Party sought to have their candidates elected to the Cook County Board, whose members are elected from various parts of the city of Chicago, as well as suburban Cook County. The Party gathered more than 25,000 signatures, the minimum requirement, in the city, but only 7,800 in the suburbs. In explaining why the Party was only established in the city, the Court explained, "Just as the State may not cite the HWP's [Harold Washington Party] failure in the suburbs as a reason for disqualifying its candidates in the city district, neither may the HWP cite its success in the city district as a sufficient condition for running candidates in the suburbs." *Norman*, 112 S.Ct. at 701.

In the case at hand, the Board claims that a showing of state support for a position like the University of Illinois Board of Trustees does not legitimize the party in every district in Illinois. We believe that the distinction between races is rational and serves a legitimate state interest. The race for governor is traditionally the state office which draws the highest number of votes in Illinois. The fact that a party drew 5% for the University of Illinois Board of Trustees does not suggest that it has achieved a modicum of support in all of the local districts in the state. In this instance, after all, the 5% was

achieved only by adding up the votes for 3 Libertarian candidates who were elected. On the other hand, it is far more believable that a party which achieves 5% in a race for governor would actually have a modicum of support all over the state. If the Libertarians were established across the board for all races, there would be many empty slots and voter confusion would likely be increased. As we established above, Illinois has an interest in keeping the ballot uncluttered and easy to understand, and ensuring with a reasonable degree of certainty that those on the ballot have received a modicum of support.

Furthermore, it is important to note that the IEC could have legitimately mandated a 5% cut-off point only to candidates for Illinois constitutional offices. Nevertheless, the Board chose to allow lesser offices such as the University of Illinois Board of Trustee to qualify for statewide recognition, even if a candidate has not achieved legitimacy in an election for Governor. We do not believe that this more liberal policy, which ultimately benefitted the Plaintiffs greatly, should be held against the state.

Finally, Plaintiff's allege that the IEC involves interference with the Qualifications Clause, Art. I, Sec. 2, Cl.2 of the Constitution. This clause articulates the qualifications that a person needs to possess in order to become a member of Congress. In *U.S. Term Limits v. Thornton*, 115 S.Ct. 1842 (1995), the Supreme Court held that a state may not add to the qualifications articulated in Article I. However, we do not believe that the IEC restrictions add a substantive qualification to congressional candidates. Section 10-2 of the IEC is simply a procedural measure which regulates elections. Anybody who follows the procedures articulated in this section can gain access to the

ballot. This substantive/procedural distinction has been recognized and upheld by the Supreme Court. In *Term Limits*, the Court explained that regulations which were procedural in nature, such as those which required a candidate or party to have a modicum or support, did not add substantive qualifications. See *Term Limits*, 115 S.Ct. at 1870 (upholding the legitimacy of the modicum of support regulations in *Storer*). Therefore, we do not believe that the IEC Section 10-2 violates the Qualifications Clause in any way.

Because we find that the burden placed on the Constitution in the instant case to be reasonable and nondiscriminatory, and also believe that the state's prospective goals are legitimate and rational, we grant summary judgment in favor of the Board. Thus, the Board is not required to allow the Libertarians to run in all Congressional primary elections.

CONCLUSION

For all of the above reasons, we grant summary judgment in favor of the Defendants. The Plaintiff's motions for a permanent injunction and for summary judgment is denied.

/s/ Charles P. Kocoras
Charles P. Kocoras
United States
District Judge

Dated: February 7, 1996

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LIBERTARIAN PARTY OF ILLINOIS, MIKE GINSBERG, R. W. BARUTH, JR., CARRIE BELT, JEANNETTE CLINKENBROOMER, GREG ENGSTROM, ROBERT H. FRANKE, ROBERT J. JOHNSTON, CHARLES METALITZ, JOHN NELSON, DAN O'CONNELL, PAUL SALANDER, GALE TESCHENDORF, LYN TINSLEY, ANNE WAGNER, MARTIN G. YASUS,

Plaintiffs

v.

ILLINOIS STATE BOARD OF ELECTIONS,

Defendants.

_____/

No. 95 C 6456

Judge Kocoras

DECLARATION OF MIKE GINSBERG

MIKE GINSBERG declares as follows:

1. I am one of the plaintiffs herein, am the state chairman of plaintiff LPI, and submit this declaration in support of plaintiffs' motion for a preliminary injunction.

2. Plaintiff LPI is an affiliation of voters formed for the purpose of influencing public policy by a variety of means, including the fielding of candidates for public

office and the dissemination of its political views on policy issues through the campaigns of its candidates for public office.

3. The national Libertarian Party, with which LPI is affiliated, has for some time been the nation's third largest political party and now has established party status in 27 states, including Illinois.

4. In 1994 LPI became an established political party as to the state of Illinois, but not as to any district or political subdivision of the state, by filing the 25,000 petition signatures required by S.H.A. 10 ILCS 5/10-2 and polling for its candidates for Trustee of the University of Illinois more than five percent of the votes cast for all of the candidates for Trustee of the University of Illinois. As such, LPI is permitted by Illinois law to nominate candidates for statewide offices in the March general primary election on the same terms as the Democratic and Republican parties nominate their candidates for statewide offices. However, LPI is still required to nominate candidates for other offices by filing the same number of petition signatures required of candidates of parties which do not have established party status.

5. For example, the seven plaintiffs who are LPI candidates for Representative in Congress are supposed to file an average of 9,377 signatures each in order to access the November 1996 general election ballot.

6. If LPI wanted to field a complete slate of congressional candidates in all 20 congressional districts in November 1996, it would have to file a total of 152,200 petition signatures. In order to have fielded a complete slate of congressional candidates in November 1994, LPI

would have had to file a total of 241,540 petition signatures in addition to the 25,000 it was required to file in order to field a slate of candidates for statewide offices as a precondition for acquiring established party status as to the state.

7. These petitioning requirements are prohibitively high. They are many times higher than the requirements for the Democratic and Republican parties, which can get their candidates for Representative in Congress on the March primary election ballot by filing an average of 658 signatures per Democratic candidate and 532 signatures per Republican candidate.

8. If the signature requirements for LPI candidates were comparable to those for Democratic and Republican candidates, LPI would indeed field candidates for Representative in Congress in all 20 congressional districts.

9. The 25,000-plus petition signatures which LPI obtained in 1994, together with the votes LPI polled for its candidates for Trustee of the University of Illinois, demonstrate that LPI has substantial support in the Illinois electorate.

10. I submit that the electorate should have the opportunity to vote for LPI candidates for congress and other public offices, and not be restricted to the perennial "choice" between Democratic and Republican candidates.

11. I submit also that it is inequitable in the extreme to deny LPI the opportunity, accorded to the Democratic and Republican parties, to nominate its candidates for offices other than statewide offices in the March primary election.

12. LPI wants only to compete on a level playing field with the Democratic and Republican parties. This would include the right to nominate candidates for offices in addition to statewide offices in the March primary elections. It would also include the right to access the ballot on the same terms as Democratic and Republican party candidates, rather than having to meet petition signature requirements that greatly exceed the requirements for Democrats and Republicans.

13. The state will be holding a primary election for LPI in March 1996 restricted to candidates for the LPI nomination for United States Senator. Since there will be an LPI primary in any event, it should not be unduly burdensome for the state to include candidates for the LPI nomination for other offices on the primary ballot.

Pursuant to 28 U.S.C. section 1746 I declare under penalty of perjury that the foregoing is true and correct. Executed on November 22, 1995.

/s/ Michael J. Ginsberg
MIKE GINSBERG

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LIBERTARIAN PARTY OF ILLINOIS, MIKE GINSBERG, R. W. BARUTH, JR., CARRIE BELT, JEANNETTE CLINKENBROOMER, GREG ENGSTROM, ROBERT H. FRANKE, ROBERT J. JOHNSTON, CHARLES METALITZ, JOHN NELSON, DAN O'CONNELL, PAUL SALANDER, GALE TESCHENDORF, LYN TINSLEY, ANNE WAGNER, MARTIN G. YASUS,

Plaintiffs — No. 95 C 6456

v. — Judge Kocoras

ILLINOIS STATE BOARD OF ELECTIONS,

Defendants.

_____/

DECLARATION OF RICHARD WINGER

RICHARD WINGER declares as follows:

1. This declaration is submitted in support of plaintiffs' motion for a preliminary injunction.

2. I reside at 3201 Baker Street, San Francisco, CA 94123. I graduated from the University of California at Berkeley in 1966 with a BA degree in political science. Since 1985 I have published a newsletter, *Ballot Access*

News (13 issues per year), which covers legal, legislative and political developments of particular interest to third parties and independent candidates. For the past 30 years I have been an avid student of electoral politics, have become very familiar with the election laws of all 50 states and the District of Columbia and their legislative histories, particularly insofar as they relate to ballot access for third parties and independent candidates, and have undertaken to monitor closely all legislative and judicial developments that affect access to the ballot. In particular, I have researched the ballot access laws of all 50 states and the District of Columbia for the entire period 1888 to the present (there were no ballot access laws in the U.S. before 1888 because there were no government-printed ballots until that year). I have testified before the Elections Subcommittee of the U.S. House of Representatives and before state legislative committees which handle election legislation in California, Georgia, Massachusetts, Michigan, Missouri and Oregon. I have also testified in ballot access lawsuits in person in Alaska, Florida, Oregon, Pennsylvania, Texas and West Virginia and by affidavit in Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Iowa, Kansas, Kentucky, Maine, Maryland, Montana, Nevada, New York, North Carolina, Oklahoma, Texas, West Virginia and Wyoming. I have suggested election law changes which have been enacted by the state legislatures of approximately half the states. I am field representative of the Coalition for Free & Open Elections and Chairman of the Northern California Committee for Party Renewal, a group of political scientists and party activists who

believe that it is in the public interest to strengthen political parties in the U.S.

3. S.H.A. 10 ILCS 5/10-3 requires that the candidates for Representative in Congress of a political party such as plaintiff LPI, which is an established party as to the state but not as to any district or political subdivision of the state, must be nominated for the general election by the filing of petitions containing a number of signatures equal to at least five percent of the vote cast for the office sought in the last general election.

4. The "five-percent" requirement was first enacted in 1931. Based on the results of the 1930 congressional elections, when 2,237,104 votes were cast for Representative in Congress in Illinois, the average number of petition signatures which minor established party candidates for Representative in Congress such as the candidate-plaintiffs had to file for the 1932 general election in the 25 congressional districts which then existed in Illinois was 4,474.

5. Because of the substantial increase in Illinois' population since 1931, the average number of petition signatures which minor established party candidates for Representative in Congress such as the candidate-plaintiffs had to file for the 1994 general election in the 20 congressional districts which now exist in Illinois was 12,077. The average number of petition signatures per congressional district which such candidates must file for the 1996 general election is 7,610.[1]

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[1] More signatures were required for the 1994 general election than will be required for the 1996 general election

6. For the 1994 general election, a minor established party such as plaintiff LPI that wanted to field candidates for Representative in Congress in all 20 of Illinois' congressional districts would have had to obtain 241,548 petition signatures to do so. For 1996, the figure is 152,200.

7. By contrast, candidates for Representative in Congress of major established parties like the Democratic and Republican parties obtain access to the March primary election ballot by filing petitions containing a number of signatures equal to one-half of one percent of the total vote cast in their respective districts for the party's candidate who received the highest number of votes statewide in the last general election held in a presidential election year. S.H.A. 10 ILCS 5/7-10.

8. Based on the results of the 1992 general election, Democratic candidates for Representative in Congress had to obtain only 658 signatures for 1994 and will have to obtain the same number for 1996, and Republican candidates for Representative in Congress had to obtain only 532 signatures for 1994 and will have to obtain the same number for 1996. 9. S.H.A. 10 ILCS 5/7-10 provides that the candidates for statewide offices of a minor established party such as plaintiff LPI obtain access to the March primary election ballot by filing petitions containing at least 5,000 signatures.

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because the 1994 signature requirement was based on the vote totals for 1992, a presidential election year in which more people voted than in 1994.

10. Illinois is the only state in the country which permits minor established party candidates for statewide offices, but not all public offices, to be nominated in primary elections and which requires candidates for the other offices to meet the same petitioning requirement imposed on the candidates of parties that have not achieved minor established party status.

11. S.H.A. 10 ILCS 5/10-3 provides for an exception to the five-percent requirement for Representative in Congress applicable to the first election following a decennial redistricting of congressional districts. In those elections (1982, 1992, 2002, etc.), the signature requirement for LPI and similar minor established party candidates for Representative in Congress is a flat 5,000.

12. It is my opinion that since the "decennial" 5,000-signature requirement suffices for 20 percent of all congressional elections, requiring substantially more signatures for the other 80 percent of congressional elections does not serve a legitimate state interest.

13. Annexed hereto as Exhibit A is a copy of a chart that I prepared which compares the ballot access requirements in all 50 states in 1994 for new parties to qualify a full slate of congressional candidates. The chart shows that Illinois' five-percent petition signature requirement for LPI and similarly situated minor established party candidates for congress was the third most restrictive such requirement in the country. Only Georgia and Louisiana had more difficult requirements.

14. Nonmajor party candidates for Representative in Congress have had very limited success in meeting

Illinois' five percent signature requirement.[2] In 1994, only two nonmajor party candidates for Representative in Congress made it onto the general election ballot in Illinois. In 1992 (when the decennial 5,000-signature exception was in effect), there were six such candidates on the Illinois general election ballot. In 1990, there were only two such candidates on the ballot. In each of the years 1988, 1986 and 1984, there was only one such candidate on the ballot.

Pursuant to 28 U.S.C. section 1746 I declare under penalty of perjury that the foregoing is true and correct. Executed on November 21, 1995.

/s/ Richard Winger
RICHARD WINGER

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[2] The five-percent petition signature requirement applies to independent candidates for Representative in Congress as well as to minor established party candidates for that office. I refer to both types of candidates as "nonmajor party candidates."

BALLOT ACCESS FOR NEW PARTY CONGRESSIONAL CANDIDATES FOR 1994

STATE	DIST	NO OF SIGS	%	PROCEDURE	ELEC CODE REF
Ala	7	12,157	.54	Single pet., all offices	17-8-2.1
Alas	1	2,586	.83	State has only one seat	15.25.160
Az	6	19,827	1.01	Single pet., all offices	16-801
Ark	4	28,520	2.16	Single pet., all offices	7-1-101(1)
Cal	52	78,992	.52	Single registration drive	6430(b)
Colo	6	3,000	.15	Separate petitions	1-4-801
Ct	6	15,008	.77	Separate petitions	9-453(d)
Del	1	159	.05	Single registration drive	15-3001
Fla	23	196,255	3.00	Separate petitions	99.0955
Ga	11	158,855	5.00	Separate petitions	21-2-170
Hi	2	4,645	1.00	Single pet., all offices	Title 2, 11-62
Id	2	9,643	1.58	Single pet., all offices	34-501(1)(c)(D)
Il	20	241,548	3.61	Separate petitions	Ch 46, 10-2
In	10	29,909	.94	Separate petitions	3-8-6-3
Io	5	1,500	.09	Separate petitions	Title 4, 44.1
Kan	4	15,661	1.15	Single pet., all offices	25-302a
Ky	6	2,400	.13	Separate petitions	118.315(2)
La	7	109,994	5.00	Single registration drive	Title 18, 441
Me	2	4,000	.44	Separate petitions	Title 21, 494.5
Md	8	73,186	3.09	Separate petitions + party petition	Art 33, 4B-1
Ma	10	20,000	.60	Separate petitions	Title 8, ch 53-6
Mi	16	25,646	.42	Single pet., all offices	168.685(1)
Mn	8	8,000	.28	Separate petitions	204B.08
Ms	5	0	.00	Single organizational meeting	23-15-1059
Mo	9	10,000	.30	Single pet., all offices	Title 9, 115.315
Mt	1	10,186	1.92	Single pet., all offices	13-10-601
Neb	3	5,834	.61	Single pet., all offices	32-526
Nev	2	4,920	.76	Single pet., all offices	293.1715
N H	2	3,000	.45	Single pet., all offices	Title 4, 655:42
N J	13	1,300	.03	Separate petitions	19:13-5
N M	3	2 x 2,850	.81	One party pet, 3 nom. pet.	1-8-2B, 1-7-2A
N Y	31	108,500	1.18	Separate petitions	Ch 17, 6-142
N C	12	51,904	1.36	Single pet., all offices	163-96(2)
N D	1	7,000	1.40	Single pet., all offices	16.1-11-30
Oh	19	34,777	.59	Single pet., all offices	3517.01
Ok	6	45,566	2.27	Single pet., all offices	Tit 26, 1-109
Ore	5	16,681	.94	Single pet., all offices	249.732
Pa	21	62,562	1.04	Single pet., all offices	Title 25, 2911
R I	2	1,000	.18	Separate petitions	17-14-7
S C	6	10,000	.65	Single pet., all offices	7-9-10
S D	1	2,568	.57	State only has one seat	12-7-1
Tn	9	19,759	.81	Single pet., all offices	2-104(27)b
Tx	30	38,900	.51	Single pet., all offices	181.005
Ut	3	300	.04	Separate petitions	20-3-38
Vt	1	0	.00	Single organizational meeting	Title 17, 2318
Va	11	15,000	.50	Separate petitions	24.1-159, 168
Wa	9	225	.01	Nominating conventions	29.24.030
W V	3	5,624	.59	Separate petitions	3-5-23
Wis	9	10,000	.30	Single pet., all offices	Title 2, 5.62
Wy	1	8,000	3.40	Single pet., all offices	22-4-402(d)

"Requirement" is the no. of sigs. or registrants needed for a new party to qualify a full slate of U.S. House candidates for the 1994 ballot. "%" means the requirement, divided by the number of registered voters as of fall 1992. "Dist" shows how many seats in each state. All procedures permit the party name on the ballot. Chart prepared Sep. 6, 1994, by Richard Winger, Bx 470296, San Francisco Ca 94147, (415) 922-9779.